



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8
999 18TH STREET - SUITE 300
DENVER, CO 80202-2466
Phone 800-227-8917
<http://www.epa.gov/region08>

November 18, 2003

Ref: 8ENF-L

SENT VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Keith Johnson
1534 N. First Avenue
Fargo, ND 58108

Re: In the Matter of: Keith Johnson
Docket No. **CWA-08-2004-0014**
Administrative Complaint and Notice of Opportunity for Hearing

Dear Mr. Johnson:

Enclosed is an Administrative Complaint and Notice of Opportunity for Hearing ("Complaint") filed by the U.S. Environmental Protection Agency ("EPA") against Keith Johnson, pursuant to its authority under section 311(b)(6)(B)(ii) of the Clean Water Act (the "Act"), 33 U.S.C. § 1321(b)(6)(B)(ii). EPA alleges in the Complaint that Keith Johnson's facility known as Keith's Oil Company or Johnson's Oil Company located at 1534 N. First Avenue, Fargo, North Dakota, is in violation of the oil pollution prevention requirements set forth at 40 C.F.R. part 112 and section 311(b)(6)(A) of the Act, 33 U.S.C. § 1321(b)(6)(A).

Specifically, the Complaint alleges that Keith Johnson failed to prepare and implement a Spill, Prevention, Control and Countermeasures ("SPCC") plan for his facility in writing and in accordance with 40 CFR §§ 112.7 and 112.8 as required by 40 CFR § 112.3. EPA discovered the violations during an unannounced SPCC inspection of the facility on September 10, 2002. The Complaint proposes a total penalty up to \$38,556 for the alleged violations.

You have the right to a hearing to contest the factual allegations in the Complaint. If you admit the allegations, or the allegations are found to be true after you have had an opportunity for a hearing, you have the right to contest the penalty proposed in the Complaint. A copy of EPA's administrative procedures is enclosed for your review. Please note the requirements for an answer set forth in 40 C.F.R. §§ 22.15 and 22.38. If you wish to contest the allegations in the Complaint or the penalty proposed in the Complaint, you must file a written answer within thirty



(30) days of receipt of the enclosed Complaint with the EPA Regional Hearing Clerk at the following address:

Ms. Tina Artemis, Regional Hearing Clerk (8RC)
U.S. EPA, Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466

If you fail to request a hearing, you will waive your right to formally contest any of the allegations set forth in the Complaint. If you fail to file a written answer or pay the proposed penalty within the time limits, a default judgement may be entered pursuant to 40 CFR § 22.17. This judgement may impose the penalty proposed in the Complaint.

Whether or not you request a hearing, you may confer informally with EPA concerning the alleged violations or the amount of the proposed penalty. You have the right to be represented by an attorney at any stage of the proceedings, including any informal discussions with EPA, but it is not required. A request for an informal conference does not extend the thirty (30) day period for filing your Answer and/or requesting a hearing. Public Notice of and reasonable opportunity to comment on the proposed issuance of an order assessing a class II civil penalty is being provided pursuant to section 311(b)(6)(C) of the Act, 33 U.S.C. § 1321(b)(6)(C). If no hearing is held under section 311(b)(6)(B) of the Act, 33 U.S.C. § 1321(b)(6)(B), any person who comments on the proposed penalty assessment may participate in a hearing on the penalty if requested pursuant to section 311(b)(6)(C)(iii) of the Act, 33 U.S.C. § 1321(b)(6)(C)(iii).

If you have any questions, the most knowledgeable people on my staff regarding this matter are Brenda Morris and Donna Inman. Ms. Morris is in our Legal Enforcement Program and can be reached at (303) 312-6891. Ms. Inman is in our Technical Enforcement Program and can be reached at (303) 312-6201.

We urge your prompt attention to this matter.

Sincerely,

SIGNED

Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

Enclosures: Complaint and Notice of Opportunity for Hearing
Consolidated Rules of Practice, 40 C.F.R. Part 22

SBREFA Information Sheet

Notice of SEC Disclosure

Public Notice

Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act, dated August, 1998.

EPA Supplemental Environmental Projects Policy, dated May 1, 1998

cc: Raymond Lambert, State of North Dakota Fire Marshall

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

IN THE MATTER OF)	Docket No. CWA-08-2004-0014
)	
Keith Johnson, Individually,)	ADMINISTRATIVE COMPLAINT AND
1534 North First Avenue)	OPPORTUNITY TO REQUEST HEARING
Fargo, North Dakota)	
)	Proceeding to Assess Class II
)	Civil Penalty Under Section 311
)	of the Clean Water Act
<u>Respondent.</u>)	

AUTHORITY

1. This is a civil administrative action issued under the authority vested in the Administrator of the Environmental Protection Agency ("EPA") by section 311(b)(6)(B)(ii) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1321(b)(6)(B)(ii), as amended by the Oil Pollution Act of 1990. The Administrator has properly delegated this authority to the undersigned EPA official. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules") set forth at 40 CFR part 22, a copy of which is enclosed.

GENERAL ALLEGATIONS

2. Respondent, Keith Johnson is an individual and therefore a "person" within the meaning of sections 311(a)(7) and 502(5) of the Act, 33 U.S.C. §§ 1321(a)(7) and 1362(5).

3. The Respondent owns and operates a bulk fuel storage facility formerly known as Keith's Oil Company, and as of June 30, 2003, now known as Johnson's Oil Company located at 1534 North First Avenue, Fargo, North Dakota ("facility"). The facility includes, but is not

limited to, fourteen tanks containing either diesel fuel, aviation fuel, heating oil, or gasoline fuel, with a total oil storage capacity of approximately 210,000 gallons.

4. Aviation fuel, gasoline, heating oil, and diesel fuel are oils within the meaning of “oil” as defined at § 311(a)(1) of the Act, 33 U.S.C. § 1321(a)(1).

5. Respondent stores, transfers, distributes, uses or consumes oil or oil products at the facility.

6. Respondent is now, and was at the time of the inspection, an “owner and operator” of an “onshore facility” within the meaning of sections 311(a)(6) and (10) of the Act, 33 U.S.C. §§1321(a)(6) and (10).

7. The facility is a “non-transportation related” onshore facility within the meaning of
40 CFR § 112.2.

8. The facility is located west of county drainage ditch which drains into the Red River.

9. The drainage ditch and the Red River are “navigable waters” and “waters of the United States” within the meaning of section 502(7) of the Act, 33 U.S.C. § 1362(7) and 40 CFR § 110.1.

10. Section 311(j)(1)(C) of the Act, 33 U.S.C. § 1321(j)(1)(C), provides that the President shall issue regulations "establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil ... from vessels and from onshore and offshore facilities, and to contain such discharges"

11. EPA promulgated the oil pollution prevention regulations, set forth at 40 CFR part 112. 40 CFR § 112.1(b) states that the requirements of part 112 apply:
- to owners or operators of non-transportation related onshore and offshore facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, using, or consuming oil or oil products, and which, due to their location, could reasonably be expected to discharge oil in harmful quantities, as defined in part 110 of this chapter, into or upon the navigable waters of the United States or adjoining shorelines”
12. The facility is a non-transportation onshore facility which, due to its location, could reasonably be expected to discharge oil to a navigable water of the United States (as defined by section 502(7) of the Act, 33 U.S.C. § 1362(7), and 40 CFR § 110.1) or its adjoining shoreline that may either (1) violate applicable water quality standards or (2) cause a film or sheen or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.
13. The facility is subject to the oil pollution prevention requirements of 40 CFR part 112, pursuant to section 311(j) of the Act, 33 U.S.C. § 1321(j), and its implementing regulations.
14. 40 CFR § 112.3 requires that owners or operators of onshore and offshore facilities prepare a Spill Prevention, Control, and Countermeasure (“SPCC”) plan in writing, and in accordance with applicable sections of part 112, including, but not limited to, sections 112.7 and 112.8.
15. Section 311(b)(6)(A) of the Act, 33 U.S.C. § 1321(b)(6)(A), states in pertinent part that any owner, operator, or person in charge of any vessel, onshore facility or offshore facility (ii) who fails or refuses to comply with any regulation issued under subsection (j) of this

section to which that owner, operator, or person in charge is subject, may be assessed a class I or class II civil penalty by ... the Administrator.

16. On or about September 10, 2002, EPA conducted an unannounced SPCC inspection ("the Inspection") of the facility.

17. At the time of the Inspection, the facility had a total fuel storage capacity of approximately 210,000 gallons.

18. The facility's written SPCC plan states that the facility will not be fenced and fails to provide for any alternative security measures in violation of 40 CFR § 112.7(g)(1).

19. The following SPCC implementation measures were found to be deficient at the facility at the time of the Inspection:

- a. Failure to conduct inspections in accordance with written procedures and to maintain the written inspection records for three years;
- b. Failure to conduct and document spill prevention briefings with operating personnel;
- c. Failure to provide adequate secondary containment for truck loading rack;
- d. Failure to provide fencing or other security measures for the facility; and
- e. Failure to lock tank drain valves or provide adequate security measures for tank master valves.

20. The Respondent failed to prepare and implement a SPCC plan in writing and in accordance with the regulations at 40 CFR §§ 112.7 and 112.8 as required by 40 CFR §112.3.

21. Respondent's failure to prepare and implement a SPCC plan in writing and in accordance with the regulations at 40 CFR §§ 112.7 and 112.8 from September 10, 2002, through and including November 17, 2003, (a duration of approximately 433 days) constitutes

violations of 40 CFR §112.3 and sections 311(b)(6)(A), 33 U.S.C. § 1321(b)(6)(A), and 311(j)(1)(C), 33 U.S.C. § 1321(j)(1)(C) of the Act.

PROPOSED PENALTY

Based on the foregoing Allegations and pursuant to the authority of section 311(b)(6)(B)(ii) of the Act, 33 U.S.C. § 1321(b)(6)(B)(ii), Complainant proposes the assessment of administrative penalties against the Respondent in the amount of \$38,556. Complainant proposes this penalty amount after considering the applicable statutory penalty factors in section 311(b)(8) of the Act, 33 U.S.C. § 1321(b)(8): Respondent's alleged violations, the seriousness of the violations, the economic benefit to the violator resulting from the violations, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other factors as justice may require. Specifically, the proposed penalty amount is based on Respondent's moderate non-compliance and moderate environmental impact for a duration of at least 60 months with a major degree of culpability. Respondent's facility was inspected by EPA in 1993, to verify compliance with the oil spill prevention regulations at 40 CFR part 112 and significant, specific, well-documented compliance assistance was provided by both EPA and the North Dakota Petroleum Marketers Association to Respondent from approximately 1993-1996, regarding the regulations specific to the development of an SPCC plan and the implementation of SPCC measures. Both the 1993 EPA inspection and the 2002 EPA inspection, evidenced identical violations that were not corrected in the ten year time frame, despite Respondent's

“Statement of Correction” dated September 27, 1995, indicating that the facility was in compliance with all requirements of 40 CFR part 112. The Respondent did not qualify for any penalty reduction

based on mitigation factors. No additions were made to the proposed penalty amount based on either a history of violations or economic benefit.

TERMS OF PAYMENT FOR QUICK RESOLUTION

If Respondent does not contest the findings and penalty proposal set out above, this action may be resolved by paying the proposed penalty in full pursuant to 40 CFR § 22.18. If such payment is made within 30 calendar days of receipt of this Complaint, no Answer need be filed. For more time for payment, Respondent may file a statement agreeing to pay the penalty within 30 days of receipt of the Complaint, then pay the money within 60 days of such receipt. Payment is to be made by sending a cashier's or certified check payable to "Oil Spill Liability Trust Fund," with the docket number and name of the facility written on the check, to:

Donna Inman
Technical Enforcement Program (8ENF-UFO)
U.S. EPA Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466

Payment of the penalty in this manner does not relieve Respondent of its obligation to comply with the requirements of the statute and regulations. Payment of the penalty in this manner shall constitute consent by Respondent to the assessment of the proposed penalty and a waiver of Respondent's right to a hearing on this matter.

OPPORTUNITY TO REQUEST A HEARING

As provided in the Act, a Respondent has the right to a public hearing to contest this Complaint. If you (1) contest the factual claims made in this Complaint; (2) contest the appropriateness of the proposed penalty; and/or (3) assert that you are entitled to judgment as a matter of law, you must file a written Answer in accordance with section 22.15 and 22.38 of the Consolidated Rules within 30 calendar days after receipt of this Complaint. Your Answer must (1) clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint with regard to which you have knowledge; (2) state circumstances or arguments which are alleged to constitute grounds for defense; (3) state the facts you dispute; (4) the basis for opposing the proposed relief, and (5) specifically request an administrative hearing, if desired. Failure to admit, deny, or explain any material factual allegation in this Complaint will constitute an admission of the allegation.

The Answer and one copy must be sent to:

Tina Artemis, Regional Hearing Clerk (8RC)
U.S. EPA Region 8
999 18th Street, Suite 300
Denver, Colorado 80202-2466

and a copy must be sent to the following attorney:

Brenda Morris, Enforcement Attorney (8ENF-L)
U.S. EPA Region 8, Legal Enforcement Program
999 18th Street, Suite 300
Denver, CO 80202-2466
Telephone: (303) 312-6891

IF YOU FAIL TO REQUEST A HEARING, YOU WILL WAIVE YOUR RIGHT TO FORMALLY CONTEST ANY OF THE ALLEGATIONS SET FORTH IN THE COMPLAINT.

IF YOU FAIL TO FILE A WRITTEN ANSWER OR PAY THE PROPOSED

PENALTY WITHIN THE 30 CALENDAR DAY TIME LIMIT, A DEFAULT JUDGMENT MAY BE ENTERED PURSUANT TO 40 C.F.R. § 22.17. THIS JUDGMENT MAY IMPOSE THE PENALTY PROPOSED IN THE COMPLAINT.

PUBLIC NOTICE

Pursuant to section 311(b)(6)(C) of the Act, 33 U.S.C. § 1321(b)(6)(C), the Complainant is providing public notice of and reasonable opportunity to comment on this proposed issuance of a Final Order assessing administrative penalties against you. If a hearing is held on this matter, members of the public who submitted timely comments on this proceeding have the right under section 311(b)(6)(C) of the Act, 33 U.S.C. § 1321(b)(6)(C), to be heard and present evidence at the hearing.

SETTLEMENT CONFERENCE

The EPA encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations and is willing to explore this possibility in an informal settlement conference. If you or your attorney, if you choose to be represented by one, have any questions or wish to have an informal settlement conference with EPA, please call Brenda Morris at (303) 312-6891. Please note that a request for, scheduling of, or participation in a settlement conference does not extend the period for filing an answer and request for hearing as set out above. The settlement process, however, may be pursued simultaneously with the administrative litigation procedures found in the Consolidated Rules. If a settlement can be reached, its terms must be expressed in a written consent agreement, signed by the parties and incorporated into a final order signed by the Regional Judicial Officer.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8**
Complainant.

Date: 11/17/03

SIGNED

Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

Date: 11/17/03

SIGNED

Brenda Morris, Enforcement Attorney
U.S. EPA, Region 8
999 18th Street, Suite 300 (8ENF-L)
Denver, CO 80202-2466

Telephone: 303/312-6891
Facsimile: 303/312-6953

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING was hand-carried to the Regional Hearing Clerk, EPA Region 8, 999 18th Street, Suite 300, Denver, Colorado, and that a true copy of the same was sent via certified mail to:

Keith Johnson
Keith's Oil Company, a/k/a
Johnson's Oil Company
1534 N. First Avenue
Fargo, ND 58108

11/18/03
Date

SIGNED
Judith McTernan

IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE CONTACT THE REGIONAL HEARING CLERK.

THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON NOVEMBER 18, 2003.